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No. 99-1913

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1999

TOWN OF NORWOOD, MASSACHUSETTS,
PETITIONER,

v.

NEW ENGLAND POWER COMPANY, NEW ENGLAND ELECTRIC SYSTEM (NEES), PACIFIC GAS & ELECTRIC COMPANY, PG&E CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

New England Power Company, formerly a wholly-owned subsidiary of New England Electric System ("NEES"), is now a wholly-owned subsidiary of National Grid USA, a Delaware corporation.

On March 22, 2000, NEES merged into National Grid USA, an indirect subsidiary of National Grid Group PLC, a public limited company organized under the laws of England and Wales, which is listed on the New York and London stock exchanges.

On April 19, 2000, Eastern Utilities Associates ("EUA") became a wholly-owned subsidiary of National Grid USA. On May 1, 2000, Montaup Electric Company, a subsidiary of EUA, merged into New England Power Company.

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BRIEF IN OPPOSITION

STATEMENT

As set out below, this case involves the routine construction of a power supply contract and the application of settled antitrust principles in the context of complex, fact-specific transactions and regulatory rulings. The petitioner Town of Norwood ("Norwood") fails to present any issue of recurring importance or involving a conflict with decisions of this Court or other courts of appeal. Its petition reduces to nothing more than its dissatisfaction with the decision of the court of appeals in favor of respondent New England Power Company ("NEP"), a decision that is not only unworthy of review but also clearly correct. The petition should be denied.

Factual and Regulatory Background. Norwood owns and operates a municipal utility that distributes retail power to residents and businesses in the town. Pet. App. at 3a. In 1983, Norwood entered into a contract to buy wholesale power from NEP under NEP's FERC tariff No. 1, "as [it] may be amended from time to time." *Id.* In 1989, Norwood exercised an option to extend its contract with NEP until October 31, 2008, terminable on seven years' advance notice. *Id.* at 4a.

During the 1990's, substantial restructuring of the electric power industry took place at both the federal and state level. At the federal level, FERC's Order 888 requires owners of wholesale transmission lines to afford non-discriminatory access to other sellers of wholesale power, on the same terms the owner provides itself.[1] As a result, customers are able to shop for competitive power from sources beyond the owner of the lines to which they are connected.

Various states have also taken vigorous action to introduce competition at the retail level. Massachusetts' restructuring legislation provides that "[t]he interests of consumers can best be served by...the functional separation of generation services from transmission and distribution services."[2] Where, as in NEP's case, a utility's restructuring plan preceded adoption of the legislation, the plan may be implemented subject to approval by the Massachusetts Department of Public Utilities.[3] Similarly, Rhode Island's restructuring legislation requires vertically-integrated investor-owned utilities to divest or otherwise spin off at least 15% of their non-nuclear generation assets. R.I. Gen. Laws §§ 39-1-27, 27.2, 27.3.

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[1] 61 Fed.Reg. 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, on rehearing 62 Fed. Reg. 12274 (March 14, 1997), III FERC Stats. & Regs. 31,048, codified at §§ 35.15, 35.26-35.28, *petitions for review pending sub nom. Transmission Access Policy Study Group* v. *FERC*, D.C. Cir. Nos. 97-1715 et al.

[2] Mass. St. 1997, c. 164, § 1(m), reprinted in Mass. Gen. Laws Ann., c. 164, § 1A.

[3] Mass. Gen. Laws c. 164, § 1A(a).

Beginning in December, 1996, after settlement agreements pertaining to its restructuring had been reached among NEP, its affiliates and state regulators, NEP made a series of regulatory filings, designed to (1) secure FERC approval for the sale of its non-nuclear generating facilities to USGenNE ("USGen"), a subsidiary of PG&E Corporation, and (2) permit NEP's affiliates, Massachusetts Electric Company ("Mass Electric") and The Narragansett Electric Company ("Narragansett"), to terminate their wholesale power contracts with NEP, subject to a payment to compensate NEP for the costs of early termination. Pet. App. at 4a. In addition, at the request of the Massachusetts and Rhode Island utility commissions, NEP's proposed restructuring included a wholesale "standard offer service" to its affiliates, who, in turn, were required to offer parallel retail standard offer rates to their own customers until they could take advantage of emerging competition. *Id.* at 4a-5a. The wholesale standard offer was not made available to Norwood and other municipal utilities because, unlike investor-owned utilities, they had no obligation to permit competitive access to their customers or afford them retail standard offer rates. *See* Mass. Gen. Laws 164, § 47A; Pet. App. at 21A.

Norwood filed suit in April, 1997, while certain initial filings were under consideration by FERC. Pet. App. at 6a. The district court denied Norwood's motion for a preliminary injunction against USGen's acquisition of NEP's assets. Additional events then occurred that resulted in amendment of Norwood's complaint.

First, the FERC approved the settlement agreements permitting Mass Electric and Narragansett to terminate their wholesale purchase contracts with NEP upon payment of contract termination charges, *New England Power Co.*, 81 F.E.R.C. ¶ 61,281 (1997), reh'g. denied, 83 FERC ¶ 61,265 (1998); approved the wholesale standard offer service, *id.*; and approved NEP's transfer of generating facilities and associated supply contracts to USGen, *New England Power*

Co., 82 FERC ¶ 61,179 (1998), reh'g. denied, 83 FERC ¶ 61,275 (1998).

Second, on March 4, 1998, Norwood notified NEP that as of April 1, 1998 it was entering into a long-term contract with another wholesale supplier. Pet. App. at 6a. In response, NEP filed an amendment to its FERC Tariff No. 1 permitting Norwood and other non-settling wholesale customers to terminate their contracts early, on 30 days' notice, upon payment of a contract termination charge. *Id.* at 7a. This charge was calculated by crediting, against the revenues expected for the remainder of the contract, the market price of power and transmission costs that would be avoided as a result of not providing service. *Id.* The FERC approved the contract termination charge. *New England Power Co.*, 84 FERC ¶ 61,175 at 61,920 (1998).

Proceedings Below. As amended, Norwood's complaint alleged that NEP breached the 1983 power contract by divesting itself of its generating facilities and charging its affiliates different rates (*i.e.*, the standard offer) than Norwood. Norwood further claimed that the contract termination charge imposed on it (and approved by the FERC), in combination with the standard offer, constituted an illegal price squeeze. Finally, Norwood asserted that NEP and USGen had conspired to fix prices in the wholesale market, and that USGen's acquisition of NEP's non-nuclear generating assets violated the Clayton Act.

The district court granted NEP's motion to dismiss under the filed rate doctrine and on the ground that Norwood had not stated a claim for breach of contract. Pet. App. at 7a-8a.

The court of appeals affirmed. First, the court held that because the power contract only required NEP to supply power under its tariffed rate, Norwood had failed to state a claim for breach based on an anticipated change in the calculation of that rate resulting from NEP's divestiture of its generating assets, or based on NEP's declining to make the standard offer available to Norwood. "[W]e agree with the district court that the contract did not contain a promise that owner-

ship of New England Power's facilities or equality of treatment vis a vis New England Power's affiliates would endure." Pet. App. at 13a. Second, the court dispatched Norwood's price-fixing claim on the ground that USGen simply assumed NEP's vertical obligations to its customers (i.e., the standard offer rates contained in the state regulatory settlements) incidental to a sale of assets. *Id.* at 22a.

Third, the court rejected Norwood's price squeeze claim on filed rate grounds, for several reasons: (1) unlike the decisions relied on by Norwood, the FERC regulated both of the tariffs allegedly comprising the squeeze, *id.* at 16a; (2) contrary to Norwood's argument that the relevant rates were "unregulated" market rates, both were "individually filed with the FERC" and "subject to ongoing FERC regulation," *id.* at 17a; (3) any exception for claims seeking declaratory and injunctive relief was inapplicable because "any meaningful relief as to the price squeeze would require the alteration of tariffs [that had been] actually scrutinized repeatedly by FERC," *id.* at 18a; and (4) even if there were room for "cutting back" on the filed rate doctrine, "this case is not a good vehicle... because the Sherman Act claims pressed by Norwood are themselves so doubtful." *Id.* at 20a. Finally, despite expressing extreme skepticism, the court concluded that Norwood's Clayton Act claim could not be resolved on a motion to dismiss and remanded that claim to the district court. *Id.* at 25a-28a.

REASONS FOR DENYING THE PETITION

A. NORWOOD PRESENTS NO ISSUE WORTHY OF THIS COURT'S REVIEW.

The decision below involved the application of the filed rate doctrine in a setting involving factually-complex transactions (NEP's divestiture and Norwood's premature termination of the power contract) and a series of fact-specific regulatory decisions. As such, it does not raise any issue of recurring importance that requires this Court to revisit the filed rate

doctrine, the limits of which it has already defined in a number of decisions.[4] And even if the Court were otherwise inclined to do so, this case — whose substantive antitrust weaknesses were oft-noted by the court of appeals, *e.g.*, Pet. App. at 14a, 20a, 21a, 26a — hardly presents the appropriate occasion. Moreover, the contract-specific determination of whether a party has stated a claim for breach is clearly a matter that the court of appeals was well-equipped to address and that does not require this Court's consideration.

Finally in this regard, Norwood fails to identify any meaningful conflict between the decision of the court of appeals and the decisions of either this Court or other circuits on any issue relevant to its petition. In the section of its petition challenging the lower court's rejection of its price-fixing claim, Norwood purports to identify a conflict with decisions of "this Court and six different circuits" with respect to the issue of antitrust immunity. Pet. at 15. However, the court of appeals' rejection of Norwood's price-fixing claim had nothing to do with "immunity" and was based on the simple determination that no price-fixing agreement had been alleged. Pet. App. at 22a; *infra* at 7. Norwood also purports to identify a "conflict" based on the court of appeals' application of the filed rate doctrine to its price squeeze claim. Pet. at 18-19. However, no such conflict exists; the cases cited by Norwood all were easily distinguished by the court of appeals on their facts because they involved challenges to the combination of a federally-regulated wholesale rate and a retail rate that was not subject to federal regulation, whereas Norwood's price squeeze claim rested on the combined effect of two tariffs, both of which not only were subject to FERC regulation, but also had been thoroughly scrutinized by the FERC in challenges brought by Norwood. Pet. App. at 15a-16a.

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[4] *E.g.*, *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981); *Square D Company* v. *Niagara Frontier Tariff Bur.*, 476 U.S. 409 (1987).

Accordingly, Norwood fails to identify any issue worthy of review on a writ of certiorari.

B. THE DECISION BELOW IS CORRECT.

Review by this Court is unnecessary for the additional reason that the decision below is undoubtedly correct. Norwood's first claim of error is that the court of appeals improperly rejected its price-fixing claim. Pet. at 12-15. However, the settlement agreements filed with state regulators in connection with NEP's request to sell its non-nuclear generating facilities to USGen clearly did not involve horizontal "price-fixing." Rather, the agreements simply effected the transfer of NEP's vertical obligations to its customers to another supplier, incidental to a sale of assets. Pet. App. at 22a.[5] Put another way, USGen succeeded to NEP's supply contracts; the two companies did not agree that *each* would charge their respective customers the *same* price.

Norwood next contends that the court of appeals erred by applying the filed rate doctrine to its price squeeze claims. Pet. at 20-22. However, the lower court's holding rested on two equally compelling grounds: (1) unlike the cases sustaining a price squeeze claim where one of the rates involved was not subject to federal regulation, *both* rates alleged by Norwood to constitute the squeeze were regulated, and had been thoroughly scrutinized by, the FERC (Pet. App. at 15a-16a); and (2) Norwood's claim that the doctrine did not apply because the rates were "market based" lacked merit because "the relevant rates and termination charge were individually filed with FERC and are subject to ongoing FERC regulation." *Id.* at 17a.

Norwood's third claim, that the "savings clause" in the Energy Policy Act of 1992, 16 U.S.C. § 824k(e)(2), somehow

[5] Norwood's attempt to characterize the court of appeals' decision as conferring antitrust *immunity* on NEP, Pet. at 15-18, clearly is misguided. The lower court simply held that on the facts alleged, there was no price-fixing agreement. Pet. App. at 22a.

abolished the filed rate doctrine (Pet. at 22-25), is clearly wrong. By its terms, the provision refers only to limited sections of the Federal Power Act, significantly not those that establish the rate filing requirements, 16 U.S.C. § 824d, *see* Pet. App. at 20a; and in any event the savings clause simply preserved the existing balance between FERC's jurisdiction and the antitrust laws and cannot be read to have overruled the filed rate doctrine *sub silentio*.

Fourth, Norwood contends that the court of appeals, by applying the filed rate doctrine to its claims for declaratory and injunctive relief, misapplied this Court's holding in *Square D*, 476 U.S. at 422 n.28. Pet. at 25-26. However, as the court of appeals correctly observed, in *Square D* the injunctive relief would not have affected any tariffed rate but merely would have assured non-collaborative individual filings by alleged conspirators. Pet. App. at 18a. Here, in stark contrast, "any meaningful relief as to the price squeeze would require the alteration of tariffs — and not merely tariffs subject to regulation but tariffs actually scrutinized repeatedly by FERC..." *Id.* Norwood's self-serving relabeling of its claims is, therefore, unavailing.

Norwood's final claim is that the dismissal of its breach of contract claim under Fed. R. Civ. P. 12(b)(6) was erroneous. Pet. at 26-30. The power contract only obligated NEP to supply Norwood pursuant to its FERC Tariff No. 1, "filed with FERC, as [it] may be amended from time to time." Pet. App. at 12a. Norwood's claim, however, is that the contract *really* meant more than it expressly provided, Pet. App. at 10a, and the court of appeals' rejection of that claim was undoubtedly correct. *Id.*

CONCLUSION

The petition should be denied.

Respectfully submitted,

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